Supreme Court, U. S.
FILED
DEC 30 1972
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IN THE

Supreme Court of the United States

October Term, 1972

No. 72—5823

ALEJANDRO DANEFF,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PETITION NOT PRINTED

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Preliminary Statement

This is a petition for a writ of certiorari to review an order of the Court of Appeals of the State of New York, entered June 1, 1972 [30 N.Y. 2d 793], unanimously affirming, without opinion, an order of the Supreme Court of the State of New York, Appellate Division, First Department, entered October 28, 1971 [37 A.D. 2d 917], which affirmed, also without opinion, a judgment of the Supreme Court of the State of New York, Bronx County, rendered December 18, 1970, convicting the petitioner, upon his plea

of guilty, of the crime of Criminal Possession of a Dangerous Drug in the Second Degree [New York Penal Law, §220.22] and sentencing him to State Prison for an indeterminate term not to exceed ten years.

Jurisdiction

The jurisdiction of this Court is evoked under 28 U.S.C. §1257(3). The order of the Court of Appeals was entered on June 1, 1972. The order of the Appellate Division was entered on October 28, 1971.

Questions Presented

In our view, no substantial federal questions have been presented in this case. Nevertheless, we shall list the claim petitioner has set forth:

1. Since the unlawful possession of *any* quantity of a narcotic drug is decreed to be a misdemeanor under Section 220.05 of the New York State Penal Law, are sections 220.23 and related felony sections of the Penal Law, under which petitioner was indicted, constitutionally invalid, in that the standard set forth to determine more severe criminal culpability and punishment is based upon the possession of a quantity of a "mixture" containing only a minute amount of narcotic, rather than the quantity of actual narcotic content?

2. Does the equal protection clause of the Fourteenth Amendment prohibit treating differently two persons, possessing the identical quantity of narcotics, one as a misdemeanant and the other as a felon subject to a mandatory life sentence, solely because the

latter possesses the identical quantity of narcotics mixed with up to 16 ounces of inert diluent?

3. By treating one possessing a misdemeanor quantity of narcotics as a felon subject to a possible mandatory sentence of life imprisonment rather than "equally" to a maximum one year sentence, and by basing the penalty upon the weight of inert innocuous and legal substances, do the felony statutes permit cruel and unusual punishment in violation of the Eighth Amendment? Whereas at bar, the statute is used to coerce a guilty plea to a reduced charge to avoid the mandatory life sentence, does the statute provide for cruel and unusual punishment?

Statute Involved

The pertinent sections of the New York State Penal Law, as set forth by petitioner, are as follows:

"Section 220.05. Criminal possession of a dangerous drug in the sixth degree—Aperson is guilty of criminal possession of a dangerous drug in the sixth degree when he knowingly and unlawfully possesses a dangerous drug.

Criminal possession of a dangerous drug in the sixth degree is a class A misdemeanor.

Section 220.15. Criminal possession of a dangerous drug in the fourth degree—A person is guilty of criminal possession of a dangerous drug in the fourth degree when he knowingly and unlawfully possesses a narcotic drug:

1. With intent to sell the same; or

2. Consisting of (a) twenty-five or more cigarettes containing cannabis; or (b) one or more preparations, compounds, mixtures or substances of an aggregate weight of (i) one-eighth ounce or more, containing any of the respective alkaloids or salts of heroin, morphine or cocaine, or (ii) one-quarter ounce or more, containing any cannabis, or (iii) one-half ounce or more, containing raw or prepared opium or (iv) one half ounce or more, containing one or more than one of any of the other narcotic drugs.

Criminal possession of a dangerous drug in the *fourth* degree is a class D felony.

Section 220.20. Criminal possession of a dangerous drug in the third degree—A person is guilty of criminal possession of a dangerous drug in the *third* degree when he knowingly and unlawfully possesses a narcotic drug consisting of (a) one hundred or more cigarettes containing cannabis; or (b) one or more preparations, compounds, mixtures or substances of an aggregate weight of (i) one or more ounces, containing any of the respective alkaloids or salts of heroin, morphine or cocaine, or (ii) one or more ounces, containing any cannabis, or (iii) two or more ounces, containing raw or prepared opium, (iv) two or more ounces, containing one or more than one of any of the other narcotic drugs.

Criminal possession of a dangerous drug in the *third* degree is a class C felony.

Section 220.22. Criminal possession of a dangerous drug in the second degree—A person is guilty of criminal possession of a dangerous drug in the second degree when he knowingly and unlawfully possesses a

narcotic drug consisting of one or more preparations, compounds, mixtures or substances of an aggregate weight of eight ounces or more, containing any of the respective alkaloids or salts of heroin, morphine or cocaine, or containing raw or prepared opium.

Criminal possession of a dangerous drug in the second degree is a class B felony.

Section 220.23. Criminal possession of a dangerous drug in the first degree—A person is guilty of criminal possession of a dangerous drug in the first degree when he knowingly and unlawfully possesses a narcotic drug consisting of one or more preparations, compounds, mixtures or substances of an aggregate weight of sixteen ounces or more containing any of the respective alkaloids or salts of heroin, morphine or cocaine, or containing raw or prepared opium.

Criminal possession of a dangerous drug in the first degree is a class A felony."

Statement of the Case

While visiting the United States on January 23, 1970, Alejandro Daneff, an Argentine businessman and petitioner herein, was stopped on a Bronx street by two detectives assigned to the Narcotics Division of the New York City Police Department. The detectives, having previously acquired a search warrant, discovered under petitioner's coat two plastic bags which contained a cocaine compound having an aggregate weight of eighteen ounces. In addition, the officers found $5000 in cash.

On February 9, 1970, the Grand Jury of Bronx County indicted petitioner, charging him with the crime of Crim-

inal Possession of a Dangerous Drug in the First Degree, a Class A felony [Penal Law, §220.33, since renumbered §220.23]. In a demurrer filed on April 20, 1970, petitioner challenged the indictment on the grounds that the felony narcotic possession statutes were unconstitutional inasmuch as they violated the Eighth and Fourteenth Amendments of the United States Constitution. After argument was heard on April 29, 1970, the demurrer was disallowed.

On September 22, 1970, in Supreme Court, Bronx County, petitioner's plea of guilty to the crime of Criminal Possession of a Dangerous Drug in the Second Degree, a Class B felony, was accepted in full satisfaction of the indictment.

On December 18, 1970, petitioner moved for an arrest of the judgment, claiming that the statute under which he was indicted was unconstitutional. The Court rejected petitioner's contention that the statute violated the equal protection clause of the Fourteenth Amendment and the "cruel and unusual punishment" provision of the Eighth Amendment and denied the motion. Petitioner was thereupon sentenced to an indeterminate term in State Prison not to exceed ten years.

Proceedings on the Motion to Amend the Remittitur

Petitioner moved in the New York Court of Appeals to have the remittitur amended. The Court of Appeals granted the motion in an order dated September 28, 1972 [31 N.Y. 2d 667 (1972)], amending the remittitur by adding thereto the following:

"Upon the appeal herein, there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Whether sections 220.22 and 220.23 of the Penal Law are constitutionally invalid as violative of the equal protection clause of the Fourteenth Amendment."

POINT ONE

Petitioner was not deprived of equal protection of the law under the Fourteenth Amendment of the Constitution of the United States.

Petitioner claims that the statutory scheme proscribing the possession of narcotic drugs violates the equal protection clause of the United States Constitution inasmuch as the pertinent felony crimes [Penal Law §§220.15 through 220.23] are classified according to the weight of the preparation, compound, mixture or substance containing narcotic drugs and not by the weight of the actual amount of the narcotic present therein. Additionally, he claims that prosecuting someone for possession of a compound which may contain only a minute quantity of narcotic violates due process.

At the outset, we note that there is some question as to the means petitioner has chosen to raise these challenges. If his contention were simply that the statutes were unconstitutional on their face, then apparently his procedure of demurr, pleading guilty, and motion for arrest of judgment would be sufficient. However, despite petitioner's labels, some of his arguments consist of allegations concerning the possibility of discriminatory enforcement and

application of these statutes. Because petitioner chose to plead guilty and avoid any adjudication of the merits of the People's evidence, the instant record provides no support for these arguments. Moreover, as a practical matter, the instant record itself serves as a poor vehicle for litigating the constitutional issues petitioner raises. As a result, petitioner and we, in turn, are forced to resort to matters *dehors* the record. For our part, we have responded to petitioner's allegations from the available source materials which, of necessity, are to be found outside the instant record. In any event, for the reasons given below we feel that all these challenges are without merit.

Regarding petitioner's equal protection argument, it is clear that in order for him to prevail on the claim he must show that the distinctions drawn by the statute are "* * * invidious and without rational basis" [*Schilb* v. *Kuebel*, 404 U.S. 357, 92 S.Ct. 479, at 485 (1971)]. As the issue at bar does not involve a "fundamental" right [see *i.e.*, *Harper* v. *Virginia*, 383 U.S. 663 (1966); *Carrington* v. *Rash*, 380 U.S. 89 (1965); *voting rights*], the legislative scheme must be initially viewed as constitutional unless and until the defendant rebuts that presumption [*Schilb* v. *Kuebel*, *supra*; *Salsburg* v. *Maryland*, 346 U.S. 545 (1954); *People* v. *Byron*, 17 N.Y.2d 64 (1966)]. For the reasons assigned below, we submit that the petitioner has failed to offer any convincing reason to overturn the statutory classification involved herein.

At this juncture we note that the relevant penal provisions were the product of several legislative reforms that had commenced in 1967. Prior to that year, an accused

who possessed any amount of a narcotic drug with the intent to sell could have been convicted of the highest possessory crime [former Penal Law, §1751(2)]. Under this scheme, a person possessing a small amount of narcotics with the intent to sell faced the same punishment as a possessor of a larger quantity of narcotics. The only difference between small "retailers" and the large "wholesalers" was that someone possessing larger quantities was presumed to have the intent to sell [*id.*, see, Penal Law, §220.20, Practice Commentary, McKinneys, pp. 10-11].

In 1967, the legislature eliminated the presumption and made the mere possession of one ounce or more of a compound containing heroin, morphine or cocaine the highest possessory crime, a class C felony [Penal Law, §220.20]. Also, this revision eliminated a previous requirement that such compounds had to contain at least a one-per centum of narcotic [former Penal Law, §1751(2)(3)].

Although these latter changes seemed more equitable than the former provision, it still provided that all persons possessing one ounce or more of a narcotic drug were to be treated equally. If there was any inequality in that system, it was eliminated in 1969 when the legislature added §§220.22 and 220.23.* These sections provided that anyone possessing eight ounces or more would be guilty of a Class B felony: possession of sixteen or more ounces constituted a class A felony.

Despite these enactments by the legislature which, with great specificity, alloted certain punishment for the pos-

* Initially numbered §220.33.

session of varying amounts of narcotic substances, petitioner now contends that the entire system is violative of the equal protection guarantee.

Petitioner maintains this position despite the fact that he admits, in his petition, that narcotics found in the illicit market are in a diluted form [Petition, p. 7]. Since it is this diluted product which is sold to the addict and inasmuch as there is no definite percentage of narcotics present in any mixture sold on the streets, we are of the view that the legislature was well advised in making the possession of this marketable compound a crime in itself without concern for the percentage of narcotics contained therein. By attacking the problem in this manner, the Legislature was not punishing a defendant for the possession of "inert, innocuous and legal substances", as petitioner argues, but rather was attempting to stem the flow of a mixture of ingredients that constituted a grave danger to society.

There is no doubt that the State has the right to legislate in an attempt to stop the trafficking in narcotics [*Whipple* v. *Martinson*, 256 U.S. 41 (1921)]. Equally beyond doubt is the right of the lawmakers to make possession of narcotic compounds illegal. Obviously, the reason for this proscription is that narcotics are sold in a diluted form and thus the final consumable product is the compound itself. Thus, the legislators decided that the harm to society is at its optimal point when the dealer has in his possession a diluted compound containing a narcotic drug ready for exchange in the illicit traffic.

Instead of claiming that the legislature did not have a rational basis for creating the distinctions herein, peti-

tioner's entire equal protection argument consists of a series of proposed instances where, through misfortune or coincidence, a person could be subject to prosecution for possessing a large quantity of a compound, mixture or substance containing a narcotic drug when such possession ostensibly would amount to a lesser crime or no crime at all [see, Petition, pp. 7-13]. Obviously, by way of these extreme examples, he is really asking this Court to determine whether it would not have been fairer to have the degree of the crime depend on the amount of actual narcotic present in the compound. But that question, we respectfully submit, is not the proper one for this Court to decide. Rather, as we have noted above, the inquiry should be focused on whether or not the legislature had any reasonable basis for the classification.

However, even if this Court were to deem the examples relevant to the discussion at bar, we suggest that their actual occurrence is unlikely. Indeed, the only hypothetical offered by defendant that could possibly be applicable to the facts herein, namely that the compound he possessed could have contained only fifty-four grains of cocaine, is highly improbable since such a drug quantity in compounds near the sixteen ounce level has been found to be "virtually non-existent" [Interim Report of the Temporary State Commission to Evaluate the Drug Law, January, 1972, ftn. p. 167]. It is noteworthy that petitioner made no attempt to present evidence of the actual strength of the compound he possessed. Thus, this Court has only petitioner's unsupported allegation that his compound might have contained only fifty-four grains of cocaine which, in view of the finding quoted above, seems incredible.

Petitioner has stated that the dilution of cocaine is similar to heroin [Petition, p. 10] and, indeed, it appears that he is correct [Interim Report, *supra* p. 190]. In this regard we note that a heroin compound if diluted to the strength suggested by defendant in his example, approximately one percent, can be and is used effectively by addicts [*State* v. *Martinez*, 15 Ariz. App. 10, 485 P.2d 600 (Ct. of App. 1971)]. This weight is far more than the addict would have for his own use and, therefore, indicates that it was possessed by a "wholesaler" in narcotics [*Turner* v. *United States*, 396 U.S. 398, 416, fnt. 30 (1970); *United States* v. *Gonzalez*, 442 F.2d 698 (2d Cir. 1971); Interim Report, *supra*, 164, 167, 191]. Indeed, eighteen ounces of such a compound would be the equivalent of about 7,920 doses for the average addict [Interim Report, *supra*, at 166]. In short, even if this were the percentage of cocaine present in the compound, petitioner would still be the type of possessor who was intended to come within the proscriptions of §220.23 of the Penal Law.

All of petitioner's additional examples are similarly without merit for petitioner does not, and indeed, cannot contend that any of them have ever occurred in the State of New York. Suffice it to say that no one has ever been convicted of the possession of a compound consisting of garbage and a narcotic, in this state or any other state. His contentions concerning paregoric, lotions used for anal discomfort, and methadone are equally unsupported by any citations to cases in which an accused has been convicted for the felonious possession of such compounds.* Thus,

* Penal Law §220.02, effective April 1, 1973, sets out a schedule of dangerous drugs (specifically incorporating provisions of the Public Health Law) that will bring New York law into conformity with the federal "Controlled Substances Act of 1970" and expressly eliminate petitioner's hypothetical suggestion that possession of certain medical preparations subjects the possessor to a felony penalty.

petitioner has merely shown that it is conceivable that some day, under certain conditions, some individuals may be punished under the instant statutes and that this punishment would be a violation of the equal protection guarantee. It is our position that such speculative instances, tantamount to a parade of horror cases, cannot be asserted by this petitioner as a violation of his rights under the Fourteenth Amendment [*Queenside Hills Realty Co.* v. *Saxl*, 328 U.S. 80 (1946), see also, *Hughes* v. *Superior Court of California*, 399 U.S. 460 at 468-469 (1950); *People* v. *Merolla*, 9 N.Y.2d 62, 68-69 (1961)].

POINT TWO

Petitioner was not subjected to cruel and unusual punishment under the Eighth Amendment to the Constitution of the United States.

Petitioner's suggested amendment to the remittitur in the Court of Appeals included the question of whether those challenged sections of the Penal Law constituted cruel and unusual punishment within the intendment of the Eighth Amendment. Having reviewed petitioner's request, the Court of Appeals expressly declined to find that it had necessarily passed upon a question under the Eighth Amendment. Thus, it is clear that the state court did not decide the Eighth Amendment issue raised by petitioner and, accordingly, that he is precluded from urging that issue before this Court [see, Stern and Gressman, *Supreme Court Practice*, Sec. 3.30, p. 131 (4th ed. 1969)].

Nevertheless, we shall briefly respond to petitioner's plaint that the felony possession statutes constitute cruel

and unusual punishment. We submit that the legislature has great latitude in gauging the severity of a crime and in determining the maximum sentence that can be imposed in each degree [*Collins* v. *Johnston*, 237 U.S. 502 (1914)]. In view of the great drug problem and the potential harm to society from a pound of cocaine mixture, it cannot tenably be argued that the imposition of a life sentence for the possession of such a quantity is cruel or unusual [*Blackburger* v. *United States*, 284 U.S. 299 (1932); *Hutcherson* v. *United States*, 345 F.2d 964 (D.C. 1965), *cert. den.* 382 U.S. 894, *ten year sentence for possession of twenty-eight capsules of heroin*]. We note that, although defendant faced the possibility of life imprisonment for possession of eighteen ounces of a cocaine compound, he eventually was sentenced to an indeterminate term not to exceed ten years.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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